IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA,
Petitioner,

v.

ISTHMIAN STEAMSHIP COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE.

None of the facts and issues in this simple admiralty suit presents any question whatever meriting review by this Court. The decisions below do not raise any novel or important federal question which this Court should decide nor do they conflict in any respect with the decisions of this Court or other federal courts. On the contrary, the opinions of the District Court (134 F. Supp. 854) and of the Court of Appeals (225 F.(2) 816) merely followed established rules of admiralty practice and the express requirement of the Suits in Admiralty Act (46 U. S. C. Sec. 741, *et seq.*) pursuant to the authority of which this suit was brought against the United States.

The suit was brought to recover $115,203.76, the unpaid balance of ocean freight which the respondent had admittedly earned. The freight was earned by the carriage and delivery of cargo shipped by the United States in 1953 upon respondent's steamer *Steel Worker* pursuant to a

bill of lading. That was the only contract or transaction pleaded in the libel. (App.[1] pp. 3a-4a)

The answer of the United States admitted that it had become obligated to respondent for the freight.[2] (See the Third Articles of the Libel and Answer, App. pp. 3a, 4a, 5a).

The sole defense pleaded in the answer was a counterclaim[3] alleged to have arisen from a contract wholly unrelated to the one set forth in the libel. (App. pp. 5a-9a). The counterclaim was upon two bareboat charters made in 1946. It claimed $115,203.76 in additional charter hire said to have accrued during the years 1946-48 for respondent's use of seven government-owned vessels, none of which was the *Steel Worker*.

Exceptions to petitioner's counterclaim were duly taken by respondent on the ground that admiralty practice does not permit a set-off or counterclaim unless it arises out of the contract, cause of action or transaction pleaded in the libel. (App. p. 15a). That rule of admiralty practice has long existed and been followed uniformly as the court rules and decisions hereinafter cited will show.

Respondent's exceptions were sustained by Judge Dimmock in the District Court (134 F. Supp. 854; App. 17a-21a). As no defense to the libel remained, the Court

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[1] Page references preceded by "App." are to the Appendix to petitioner's brief in the Court of Appeals, which has been filed in this Court.

[2] The petition also describes respondent's claim variously as one which the United States "admittedly owes", or as "admittedly due" or "a debt owed" or an "uncontested claim" or as "undisputed". (Petition, pp. 2, 7, 9, 10, 12).

[3] Three weeks before filing the answer in this suit, the United States had brought a separate suit in admiralty against respondent (bearing Docket No. A 185-274 in the United States District Court, Southern District of New York) wherein the sole cause of action alleged was identical with the cause of action pleaded as a counterclaim in this suit. Respondent has filed an answer denying its liability, respondent has been examined before trial, and the suit is at issue awaiting trial.

granted respondent a decree *pro confesso* for the principal amount, together with costs and interest at 4% from the date when the libel was filed. The total indebtedness fixed by the decree was the sum of those three items, amounting to $117,314.27. (App. 23a). In accordance with usual practice and with Section 743 of the Suits in Admiralty Act (46 U. S. C. 743) the decree included interest at the rate of 4% per annum on the total amount of the decree from the date of the decree until paid.

Upon petitioner's appeal, the decree of the District Court was unanimously affirmed. (225 F. (2d) 816; Petition, pp. 18-19). The short affirming opinion of the Court of Appeals, Second Circuit, adopted the Court's reasoning in the companion case of *Grace Line, Inc.* v. *United States*, 225 F. (2d) 810.

Statute Involved.

The petition fails to quote all the portions of Section 3 (Sec. 743) of the Suits in Admiralty Act (approved Mar. 9, 1920), which in this case involves. The following are the material portions, (41 Stat. 526; 46 U. S. C., Sec. 743, emphasis ours):

> "**That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree** against the United States or such corporation **may include** costs of suit, and **when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied,** or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction * * *."

ARGUMENT.

I.

PETITIONER'S COUNTERCLAIM COULD NOT BE MAINTAINED IN THIS SUIT BECAUSE THE SUITS IN ADMIRALTY ACT REQUIRES OBSERVANCE OF THE ADMIRALTY RULE FORBIDDING SET-OFFS OR COUNTERCLAIMS UNRELATED TO THE SUBJECT MATTER OF THE LIBEL.

The petition does not deny that if this were a case between private parties, the petitioner's counterclaim could not be maintained because it is upon a cause of action unrelated to the subject matter of the libel and, therefore, forbidden by a long-established rule of admiralty practice.

Among the many decisions uniformly applying that rule of admiralty practice, both in private and government cases, are the following: *Ozanic* v. *United States*, 1951, C. C. A. 2, 188 F. (2) 229; *Castner, Curran & Bullitt, Inc.* v. *United States*, 1925, C. C. A. 2, 5 F. (2d) 214; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line*, (S. D. N. Y.) 180 F. 902, aff. 185 F. 386; *Susquehanna S. S. Co.* v. *A. O. Anderson & Co.*, 1925, C. C. A. 4, 6 F. (2d) 858; *The Jane Palmer*, S. D. N. Y., 270 F. 609; *Tice Towing Line* v. *United States Lighterage Corporation*, E. D. N. Y., 1932 A. M. C. 794; *The Yankee*, E. D. N. Y., 37 F. Supp. 512; *Hildebrand* v. *Geneva Mill Co.*, 1929, (M. D. Ala.) 32 F. (2d) 343; *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, C. C. A. 1, 116 Fed. 857; *Anderson* v. *Pacific Coast Co.* (N. D. Cal.) 99 F. 109; *Howard* v. *9889 Bags of Malt*, (D. C. Mass.) 255 F. 917; *Rodgers Sand Co.* v. *Monongahela & Ohio Dredging Co.*, C. C. A. 3, 296 F. 919.

Recognition of that rule of admiralty practice also appears in Rule 50 of the general rules promulgated by the Supreme Court for Admiralty Practice in the Courts of the

United States (28 U. S. C. A. following Section 723) and Rules 16 and 17 of the admiralty rules of the Southern and Eastern Districts of New York. The text of the pertinent parts of those rules is printed as an Appendix to this brief.

The foregoing rule being unquestionably among "the rules of practice obtaining in like cases between private parties," its application to this case by the courts below was mandatory because of the first sentence of Sec. 3 of the Suits in Admiralty Act, already quoted.

Somewhat disingenuously, petitioner's argument ignores that statutory requirement. In fact, the petition invites this Court to except government answers in admiralty from the established rule of practice, notwithstanding the statute, by allowing the government to interpose a set-off or counterclaim unrelated to the subject matter of the libel.

Not only is such an exception forbidden by statute but also there is no sound reason for making such an exception, as the further points of argument will show.

II.

A SPECIAL RULE PERMITTING SET-OFF OF UNRELATED GOVERNMENT CLAIMS IN ADMIRALTY IS WHOLLY UNNECESSARY FOR THE FULL PROTECTION OF THE GOVERNMENT'S INTERESTS.

In 31 U. S. C. Sec. 227,[4] Congress has specified the withholding or set-off procedure to be followed by the

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[4] Section 227 of Title 31 reads (italics ours):

> "When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such

General Accounting Office in cases where judgment is recovered against the United States and the judgment creditor owes an indebtedness to the United States or is claimed to be so indebted.

In such cases, if the judgment creditor denies his indebtedness, the United States must prosecute suit against the judgment creditor to establish the disputed claim. If the United States fails to establish its claim or fails to establish it in full, the judgment creditor is entitled to the amount wrongfully withheld *together with interest thereon.*

This procedure fully protects the United States and, at the same time, gives the judgment creditor some measure of redress, by way of interest, when the government's set-off is unfounded.

In the instant case, the United States has already instituted a separate suit in admiralty on its disputed claim (See Note 3, *supra*). Therefore, in order to protect the United States fully, the General Accounting Office needs

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plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. *And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff.* Mar. 3, 1875, c. 149, 18 Stat. 481; Mar. 3, 1933, c. 212, Title 11, §13, 47 Stat. 1516."

only to follow the other steps specified in 31 U. S. C. Sec. 227.

No reason appears why the United States would suffer any prejudice or disadvantage whatever by prosecuting its disputed claim in the pending separate suit rather than as a set-off to respondent's undisputed claim.

Petitioner's contention that such a set-off is an incident of so-called "administrative recoupment" pursuant to 31 U. S. C. Sec. 71, will not bear analysis, as the next point of argument shows.

III.

ENFORCEMENT OF THE ADMIRALTY RULE PROHIBITING UNRELATED SET-OFFS DOES NOT IN ANY RESPECT CONFLICT WITH THE FULL EXERCISE OF THE AUTHORITY CONFERRED UPON THE GENERAL ACCOUNTING OFFICE BY 31 U. S. C. SEC. 71, TO SETTLE AND ADJUST CLAIMS BY OR AGAINST THE UNITED STATES.

Congress gave originally that identical authority to the Accounting Officers of the Treasury in 1817 (3 Stat. 366) and merely transferred it to the General Accounting Office when that agency was formed in 1921.

Nothing in the statute confers or purports to confer power upon government accounting officers to make a binding determination of any claim by or against the United States without the consent of the debtor or creditor, as the case may be.

The term "administrative recoupment" used in the petition is merely one way of describing a frequent occurrence both in government and private business. Many debtors will not pay a debt if the debtor has or purports to have a claim against the other party. In such a case the debtor may prefer to treat his debt as a credit against his own claim.

At common law, such unilateral action by one party does not discharge, extinguish or diminish either of the cross-debts. That may only be done by agreement of the parties or by judicial action. (*Williston on Contracts*, Rev. Ed., Sec. 887e).

Sec. 71 of Title 31 does not prescribe any different rule. As the Court of Appeals said and the petitioner admits (p. 10), there is nothing in the statute to warrant the inference that "the Congress intended to by-pass the process of adjudication and provided in lieu thereof a unilateral decision by the Comptroller General".[5]

Consequently respondent's right to maintain the cause of action set forth in the libel remained unimpaired, notwithstanding the refusal of payment by the General Accounting Office because of its off-set of the unrelated and disputed claim of the United States against respondent which subsequently was pleaded in petitioner's answer to the libel.

Those undeniable facts dispose of the petitioner's first two arguments (Petition, pp. 8-11).

The petitioner's refusal to pay respondent's claim could not possibly afford support to petitioner's contention that it had paid respondent's claim by the set-off and that petitioner's defense of set-off was really one of payment.[6] As the Court of Appeals said: "* * * it is abun-

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[5] This and subsequent quotations are from the opinion of the Court of Appeals in *Grace Line* v. *United States*, 225 F. (2d) 810, 812, the reasoning of which was adopted by that Court in this case.

[6] Petitioner's allegations in its pending separate suit (See note 3, *supra*) upon its counterclaim are directly contrary to its present characterization of the counterclaim in this suit as equivalent to a plea of payment of respondent's claim.

In article NINTH of the libel in A 185-274, the Government expressly alleged:

> "Although duly demanded no part of said sum of $115,203.76 has been paid and there is now due and owing

dantly clear to us, and we so hold, that the unilateral withholding and applying of money allegedly due the United States on a disputed claim against a creditor does not constitute payment of that creditor's claim against the United States." (Petition, p. 27; 225 F. (2d) 814).

Petitioner's second argument (p. 10)—that the subject matter of respondent's suit was "review of the government's act of recoupment"—hardly deserves mention.

Respondent had no cause of action upon which to invoke the jurisdiction of the District Court under the Suits in Admiralty Act except respondent's affirmative claim which petitioner had refused to pay. Respondent could not possibly have a cause of action upon its own disputed and unpaid obligation to petitioner.

As the Court of Appeals said: "No amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure" (Petition, p. 29; 225 F. (2d) 815).

IV.

PETITIONER'S CONTENTION (PP. 11-13) THAT THE ADMIRALTY RULE AGAINST UNRELATED SET-OFF SHOULD BE MODIFIED IS NOT AN ARGUMENT OPEN TO PETITIONER IN THIS CASE, EVEN IF THE RESTRICTED JURISDICTION OF THE ADMIRALTY COURTS AND OTHER CONSIDERATIONS DID NOT ALSO MAKE THE PETITIONER'S CONTENTION UNSOUND.

The admiralty rule unquestionably exists and Section 3 of the Suits in Admiralty Act (46 U. S. C. 743) requires that it be observed.

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to libelant from the respondent the sum of $115,203.76 with interest thereon from July 31, 1948."

As Judge Dimock said (App. p. 20a):

"If it [the government] paid the freight it did so by cancelling its claim against Isthmian for charter hire. Suit for the charter hire is completely inconsistent with any such cancellation."

Moreover, notwithstanding petitioner's implication to the contrary, (petition pp. 11-13) the result achieved in this suit is quite compatible with the result that would have been obtainable if the Federal Rules of Civil Procedure had been applicable. Rule 42(b) permits separate trial of any claim, cross-claim, counter-claim or third-party claim. Rule 54(b) permits entry of final judgment upon a claim, cross-claim, counter-claim or third-party claim in an action before the remaining claims in the action have been adjudicated. Rule 62(h) permits a stay of such a final judgment, however, when a stay is appropriate.

In substance, that is the result which has been accomplished in this case. Final judgment upon the respondent's undisputed claim has been entered and the suit upon the petitioner's disputed claim is to be separately tried and adjudicated. Meanwhile, collection of respondent's judgment can be stayed, in effect, by the procedure prescribed in Section 227 of Title 31, U. S. C.

V.

PETITIONER'S ASSERTION THAT THE DECREE ALLOWED "COMPOUND INTEREST" AGAINST THE UNITED STATES AND SO WAS UNAUTHORIZED BY THE SUITS IN ADMIRALTY ACT, IS UNFOUNDED.

As the decree was "for a money judgment", Sec. 3 of the Suits in Admiralty Act, (46 U. S. C. Sec. 743, quoted *supra*) expressly authorized the inclusion of "interest at the rate of 4 per centum per annum until satisfied."

The interest authorized was obviously interest upon the entire judgment debt "until satisfied". The full amount of the decree became due and owing as a single judgment debt upon entry of the decree. The principal amount of respond-

ent's claim, interest to the date of the decree and costs of suit were all merged into the single judgment debt and ceased to exist otherwise. (*Morley* v. *Lake Shore R. Co.*, 146 U. S. 162, 168).

In cases where the judgment debtor is a private person and unsuccessfully appeals instead of paying the judgment debt, he becomes liable for interest on the full amount of the judgment until it is paid. That does not constitute the award of "compound interest" in any real sense. After the judgment, only the judgment debt exists.

Nothing in the Suits in Admiralty Act limits the award of interest in the decree to interest on the principal amount of the claim. Therefore, Sec. 3 of the Act makes the same rule that is applicable in suits between private parties, likewise applicable in this suit. It was so held in *National Bulk Carriers* v. *United States*, 3 Cir., 169 F.(2d) 943, 941, which was a suit governed by the Suits in Admiralty Act.

VI.

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

New York, New York,
September 18, 1958.

Respectfully submitted,

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APPENDIX.

(See p. 5.)

I. Rule 50 of "The Rules of Practice in Admiralty and Maritime Cases", promulgated by The Supreme Court of the United States, Dec. 6, 1920 (28 U. S. C. A. "Rules" Volume) (emphasis ours):

> "*Security on cross-libel.* Whenever a cross-libel is filed upon *any counterclaim arising out of the same contract or cause of action for which the original libel was filed,* and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security * * *."

II. Admiralty Rules of the United States District Courts for the Eastern and Southern Districts of New York (emphasis ours):

> "Rule 16: *Recoupment and Cross-Libel.* If a respondent or claimant shall desire to recoup or set off any damages sustained by him *growing out of the transactions referred to in the libel,* he must in his answer state the facts and his own damages in like manner as upon filing a cross-libel * * *. He shall not, however, be entitled to any affirmative recovery upon such answer. In any case where a cross-libel *in personam* will lie, service of such cross-libel may be made on the proctors for the libellant.
>
> "Rule 17. *Cross-claim against Co-Respondent or Claimant.* A respondent or claimant may, by petition or pleading, state a claim, *arising out of the transaction, occurrence or property that is the subject matter of the original cause,* against a co-party who has appeared or claimed in the suit. * * *"